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A Tribal Perspective on ESA Reform

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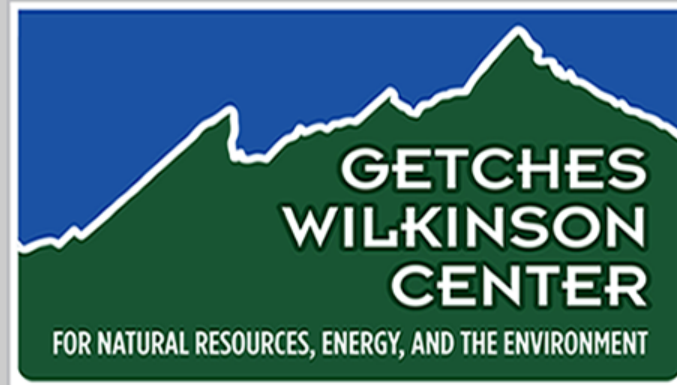
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A TRIBAL PERSPECTIVE ON ESA REFORM
Ted Strong, Executive Director
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I. INTRODUCTION

- A. Although the ESA, labeled by many as the United States' most powerful environmental statute, can assist in preventing the extinction of the plants, birds, fish and wildlife that form the core of tribal spiritual, cultural, subsistence and economic existence, the Act, as currently implemented, can hamper tribal efforts to manage tribal resources. In addition, the ESA is the environmental statute of last resort; it is evoked only after other statutes and authorities, such as the Clean Water Act and National Forest Management Act, have been implemented in such a manner that they fail to protect the ecosystems upon which the subsequently listed species depend.
- B. The problems that tribes have with the ESA center on the fundamental differences between how Indian and non-Indian people view the relationship of humans to the natural world. Indian people have always felt a sacred bond with the natural world and all of its creatures. The Indian worldview teaches that natural resource management should proceed by addressing whole natural systems, not just single species which is the focus of the ESA. Many tribes are developing, adopting, and implementing integrated resource management plans for tribal resources that move beyond the requirements of the ESA.
- C. The United States is bound by a high and solemn trust responsibility to protect and enhance tribal sovereignty and resources. Although the federal government has compelling reasons to support and encourage innovative and effective tribal management of land, water, and wildlife, so far, it has administered the ESA in a bureaucratic manner that does not respect tribal values and sovereign rights.

II. TRIBAL APPROACH TO NATURAL RESOURCE MANAGEMENT

- A. Tribal people have managed their lands and resources since time immemorial. Tribal survival and prosperity have always depended on respect for, and utilization of, plants, fish, birds, wildlife in accordance with spiritual and cultural traditions. These traditions are founded on the understanding that all things, the land, air, water, and all forms of life, are intertwined.

- B. Modern tribal resource management combines technological advances with the unique cultural values of tribal societies. Nearly all tribes employ professional resources managers who care for tribal resources and implement plans developed by tribal policy makers and reflect tribal values. On large reservations, tribal natural resources staff may form one of the largest departments of tribal government. (E.g. Yakama Indian Nation natural resource management.)
- C. Tribal natural resource management is guided by spiritual values which emphasize sustainability and the interdependence between ecological and human communities. The ultimate goal is to protect healthy ecosystems and resource productivity so they can sustain and promote tribal cultural values. Thus, tribal resource management goes beyond trying to prevent species extinction. Tribal goals focus on sustaining natural resources and ecosystems in accordance with tribal cultural and spiritual values forever.

III. FEDERAL-TRIBAL RELATIONSHIP AND THE ESA

- A. Indian reservations were created to provide homelands where tribes could live and utilize their resources for their own benefit in accordance with their own values, customs, laws, and traditions. Many tribes also retained sovereign rights to hunt, fish, trap, and gather fish, wildlife, and plants for subsistence, religious, ceremonial, and commercial purposes. These rights extend beyond the boundaries of the reservation.
- B. As non-Indian settlement began to encroach upon tribal lands and deplete natural resources, tribal values were ignored and tribal communities forced onto reservations. No one argues that tribal actions caused the problems leading to the ESA - diminishment of wildlife and habitat due to rapid and extensive development. No species has ever been listed under the ESA due to poor management decisions of an Indian tribe. When mismanagement in Indian country has occurred, federal, not tribal managers were in charge. Today, most tribes have assumed management of their lands and are implementing sustainable management practices.
- C. Although it is the excesses of non-Indian development that have driven species to the edge of extinction, there are focussed efforts by the federal government to curtail Indian activities. Fish, wildlife and plants have important cultural significance for most Indian people and the tribes rely on many natural substances which have become scarce. Traditional practices are increasingly burdened and limited by hypertechnical and culturally insensitive bureaucratic processes. In addition, Indian lands are not part of the public domain, yet in many cases, Indian lands are actually subjected to far more stringent restrictions than other private lands. The involvement of federal agencies, acting in trustee or permitting capacities, regularly subjects the tribes' lands and resources to the imposition of non-Indian values on the tribal use of tribal resources.

- D. The United States has an obligation to protect the inherent sovereign powers of tribal governments and the resources it holds in trust for Indian people. If the United States had lived up to its treaty and trust obligations to the tribes, culturally significant species such as eagles, salmon and wolves should have never declined to the point of being listed under the ESA. Indeed, there are numerous federal laws designed to protect wildlife and their ecosystems, which if implemented properly would address the causes for species decline.

IV. NEED FOR ADMINISTRATIVE FLEXIBILITY TO ACCOMMODATE TRIBAL SOVEREIGN RIGHTS AND FULFILL THE TRUST RESPONSIBILITY

- A. In order to accord proper respect for tribal sovereign rights and fulfill the trust responsibility, the federal government needs to adopt a new approach to administration of the ESA, one that reflects the distinctive circumstances and values of Indian people and tribal governments. Regardless of whether the issues involve reservation lands, off-reservation resources, or religious practices, tribal rights to make decisions in accordance with their own beliefs and values must be protected.
- B. Considerable flexibility exists to integrate tribal approaches to resources management, commonly referred to by others as "ecosystem management," with the administration of the ESA. If pursued in a creative manner, such an approach would accord the proper respect for tribal sovereignty, Indian religious freedom, sovereign tribal resource rights and the trust relationship. By honoring the tribes' own unique and highly effective philosophies for resource management, the approach would also have scientific integrity and is consistent with this Administration's determination to implement the ESA flexibly, using locally developed programs to the greatest extent possible.

V. COLUMBIA RIVER BASIN SALMON - AN EXAMPLE

- A. Indian people and the salmon they depended on thrived in the Columbia River Basin for thousands of years. The relationship between the Indian people of the Pacific Northwest and the salmon epitomizes the Indian values that have always shown the highest and most profound obligations toward natural life. The salmon, and the waters they lived in, were the foundation of a rich and deeply spiritual existence.
- B. With non-Indian settlement and development of the Columbia River Basin came large-scale declines in salmon abundance. Eventually, dwindling salmon runs led to the historic struggle of Northwest Indian tribes to protect their rights to utilize the salmon, which the tribes reserved by treaty with the United States. A century-long struggle in the courts of the United States resulted in the tribes gaining protection of their treaty rights and recognition as co-managers of the now shared salmon resource. Under the standards set in United States v. Oregon and related proceedings, the treaty fishery can only be

restricted after certain conditions have been met. First, it must be established that the proposed restrictions are both reasonable and necessary for preservation of the species; the burden of establishing such facts is on the party proposing the restrictions. Second, in order to be deemed necessary, the proposed restrictions must be the least restrictive measures available to achieve the required conservation purpose. Third, it must be determined that the conservation purpose of the proposed restrictions cannot be achieved solely by regulation of non-Indian activities. Fourth, the proposed restrictions may not discriminate against Indians exercising their treaty rights, either as stated or applied. And fifth, voluntary tribal actions are not adequate to achieve the conservation purpose.

C. Even with the establishment of clear standards for fishery management and a framework for rebuilding the fishery resource, salmon runs continued to decline and in the 1990's several salmon stocks in the Snake River, the largest tributary to the Columbia, were listed under the ESA. Currently, all other salmon species in the Pacific Northwest are being considered for listing under the ESA. The National Marine Fisheries Service is the federal agency responsible for administering the ESA for marine species such as salmon. In administering the ESA for the listed Snake River salmon stocks, the NMFS has not accorded proper respect for the tribes' treaty rights. Although NMFS acknowledges that treaty rights impose clear limitations on NMFS' authority to restrict tribal activities as demonstrated by its recognition of the five conservation standards, NMFS has not complied with those standards by its actions. Specifically, NMFS has tried (unsuccessfully) to restrict tribal fisheries without first meeting the conservation standards. NMFS has also thwarted tribal recovery initiatives, which utilize propagation, but at the same time NMFS has avoided taking serious corrective action with respect to the major causes of species decline - the federal hydrosystem and mismanagement of federal lands.

D. For decades, the Columbia River tribes have advocated for a gravel-to-gravel or ecosystem management approach to preserving and rebuilding Columbia River salmon runs. Thus, the tribes have pushed for changes in all types of activities which effect salmon survival. Recently the Columbia River tribes put forth a restoration plan for Columbia River salmon which integrates tribal values with a scientific framework for salmon restoration. However, when the tribes sought comments from the federal agencies they were met with silence. It is this kind of lack of respect for tribal initiatives which must be rectified by the Administration.